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Mr Mamasobri Useng v Public Prosecutor

B

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–56 OF 2006
HASAN LAH, AHMAD MAAROP AND APANDI ALI JJCA
7 JUNE 2010

C

Criminal Law — Dangerous Drugs Act 1952 — ss 39B(1)(a), (2) — Trafficking in dangerous drugs — Drugs found in specially constructed concealed compartment in vehicle — Whether accused in possession of drugs — Possession, characteristics of — Whether accused had knowledge of nature of drugs — Whether necessary for presumption of knowledge under s 37(h) of the Dangerous Drugs Act 1952 to be invoked — Whether vehicle was within meaning of words 'anything whatsoever containing any dangerous drug' in s 37(d) of the Dangerous Drugs Act 1952

D

E

Criminal Procedure — Appeal — Appellate court, power and duty of — Appeal to Court of Appeal against perceived misdirection by High Court — No substantial miscarriage of justice occasioned — Whether proper for Court of Appeal to invoke proviso to s 60(1) of the Courts of Judicature Act 1964

F

Criminal Procedure — Trial — Misdirection — Confusion over trial judge's reference to statutory presumptions and burden of proof — Overwhelming evidence to sustain trial judge's findings — No substantial miscarriage of justice — Whether proper for Court of Appeal to apply proviso to s 60(1) of the Courts of Judicature Act 1964

G

Evidence — Circumstantial evidence — Inferences from facts — Conduct of accused — Accused appeared stunned, scared and nervous — Whether conduct relevant and admissible — Evidence Act 1950 s 8

H

The appellant was driving a pick-up ('the vehicle') at an immigration complex when he was stopped by PW1 for a routine search. The appellant appeared to PW1 worried and in a state of panic. An inspection of the vehicle led to the discovery of a plastic package containing cannabis under the driver's seat. From the right trouser pocket of the appellant, PW1 found a key with a remote control, which the appellant claimed was the key to another car. During a further inspection of the vehicle, PW1 found a specially constructed compartment underneath the back passenger's seat. This compartment could be partly opened with the remote control taken from the appellant. From this compartment, PW1 found a further 23 plastic packages containing cannabis.

I

The appellant was subsequently charged in the High Court with trafficking in 23,829g of cannabis, contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and punishable under s 39B(2) of the same Act. He was convicted thereon and sentenced to death. He appealed to the Court of Appeal against conviction and sentence. On appeal, the appellant's counsel submitted that the judge had erred in: (i) invoking double presumptions; (ii) not making any finding of actual possession of the dangerous drugs and (iii) applying the wrong burden of proof upon the appellant.

Held, dismissing the appeal:

(1) Notwithstanding confusion over the applications of the presumptions and purported wrong burden of proof, there was overwhelming evidence to support the conviction. The appellant was clearly in possession of the drugs, as all three incriminating characteristics of possession were present, to wit: (i) knowledge of the nature of the thing possessed; (ii) power of disposal of the thing possess and (iii) conscious possession of the thing. Further, the trial judge had in fact made an actual finding on the issue of possession (see paras 15–16); *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54 followed.

(2) A closer reading of the grounds of judgment revealed no error committed by the trial judge (see para 18).

(3) Section 37(d) of the Act was not applicable in the instant case since a vehicle in which the drugs are carried does not fall within the meaning of the words 'anything whatsoever containing any dangerous drug'. Further, the presumption under s 37(h) of the Act — a presumption as to knowledge of concealment — was also not applicable since from the evidence adduced there were other facts that showed such knowledge by the appellant (see para 19).

(4) The trial judge's list of findings was sufficient to infer guilty knowledge on the appellant. The evidence of the appellant looking stunned, scared and nervous was evidence of conduct relevant under s 8 of the Evidence Act 1950 and therefore admissible. On the facts, knowledge could be inferred. There was no need for the prosecution to rely on the presumption of knowledge under s 37(h) of the Act. It was also clear that the appellant was in possession of the packages containing the drugs. Since the amount of cannabis was in excess of 200g, the statutory presumption of trafficking would be triggered under s 37(da) of the Act (see paras 22–23).

(5) There was no error or misdirection by the trial judge. Even if there had been a misdirection, the proviso to s 60(1) of the Courts of Judicature Act 1964 was sufficient for the Court of Appeal to act on. In that event, its application would be proper and appropriate. Notwithstanding the

A confusion over the usage of the statutory presumptions, having regard to the overwhelming nature of the prosecution's case, the trial judge would have come to the same decision. He had made a correct decision in convicting the appellant. The decision was based on cogent and admissible evidence. The misdirection, if any, had not occasioned any
B miscarriage of justice (see paras 24–25).

[Bahasa Malaysia summary

Perayu memandu sebuah kenderaan pikap ('kenderaan tersebut') di sebuah kompleks imigresen apabila dia diberhentikan oleh PW1 untuk pemeriksaan
C rutin. Dari penglihatan PW1, perayu kelihatan gusar dan panik. Pemeriksaan terhadap kenderaan tersebut membawa kepada penemuan satu bungkusan plastik mengandungi kanabis di bawah tempat duduk pemandu. Dalam poket kanan seluar perayu, PW1 menemui kunci dengan kawalan jauh, yang mana perayu mengatakan kunci kepada kereta lain. Semasa pemeriksaan lanjut
D kenderaan tersebut, PW1 menjumpai satu bahagian yang dibina khas di bawah tempat duduk penumpang bahagian belakang. Bahagian tersebut boleh dibuka dengan separuh menggunakan alat kawalan jauh yang diambil daripada perayu. Dalam bahagian ini, PW1 menjumpai 23 bungkusan plastik lain mengandungi kanabis. Perayu kemudiannya dituduh di Mahkamah Tinggi
E dengan mengedar 23,829g kanabis, bertentangan dengan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dan boleh dihukum di bawah s 39B(2) Akta yang sama. Dia telah disabitkan dan dijatuhkan hukuman mati. Dia merayu ke Mahkamah Persekutuan terhadap sabitan dan hukuman tersebut. Semasa rayuan, peguam perayu menghujah bahawa hakim telah khilaf dalam: (i)
F menggunapakai anggapan berganda; (ii) tidak membuat sebarang penemuan milikan sebenar dadah berbahaya tersebut; dan (iii) menggunapakai beban pembuktian yang salah ke atas perayu.

Diputuskan, menolak rayuan:

G (1) Tanpa mengambilkira kekeliruan terhadap aplikasi anggapan dan beban pembuktian salah yang dimaksudkan, terdapat keterangan mencukupi yang menyokong sabitan tersebut. Perayu jelas memiliki dadah tersebut kerana ketiga-tiga ciri yang membabitkan pelakuan
H jenayah memiliki dadah wujud, iaitu: (i) pengetahuan sifat barangan yang dimiliki; (ii) kuasa untuk menjual barangan yang dimiliki; dan (iii) sedia maklum memiliki barangan tersebut. Selanjutnya, hakim bicara telah membuat keputusan tentang isu pemilikan (lihat perenggan 15–16); *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54
I diikut.

(2) Daripada pembacaan teliti alasan penghakiman menunjukkan tiada kesilapan oleh hakim bicara (lihat perenggan 18).

(3) Seksyen 37(d) Akta tidak boleh digunapakai kepada kes ini kerana kenderaan yang membawa dadah tersebut tidak termasuk dalam maksud perkataan 'anything whatsoever containing any dangerous drug'. Selanjutnya, anggapan di bawah s 37(h) Akta, iaitu anggapan pengetahuan penyembunyian, tidak terpakai kerana daripada keterangan yang dikemukakan, tiada fakta menunjukkan pengetahuan tersebut oleh perayu (lihat perenggan 19).

(4) Senarai penemuan hakim bicara adalah mencukupi untuk menunjukkan pengetahuan kebersalahan perayu. Keterangan tentang perayu yang kelihatan terkejut, ketakutan dan gementar adalah keterangan perlakuan yang relevan di bawah s 8 Akta Keterangan 1950 dan oleh itu boleh diterima. Atas fakta, pengetahuan boleh disimpulkan. Tidak perlu bagi pendakwaan bergantung kepada pengetahuan di bawah s 37(h) Akta. Adalah juga jelas bahawa perayu memiliki bungkusan-bungkusan mengandungi dadah tersebut. Disebabkan jumlah kanabis tersebut melebihi 200g, anggapan statutori mengedar dicetuskan oleh s 37(da) Akta (lihat perenggan 22–23).

(5) Tiada kesilapan atau salah arah oleh hakim bicara. Walaupun jika adanya salah arah, proviso kepada s 60(1) Akta Mahkamah Kehakiman 1964 mencukupi bagi Mahkamah Rayuan untuk bertindak. Dalam keadaan demikian, penggunaannya adalah bersesuaian dan bertepatan. Tanpa mengambilkira kekeliruan tentang penggunaan anggapan statutori, melihat kepada sifat kes pendakwaan yang sangat kukuh, hakim bicara akan membuat kesimpulan yang sama. Beliau telah membuat keputusan tepat mensabitkan perayu. Keputusan tersebut adalah berdasarkan keterangan yang meyakinkan dan boleh diterimapakai. Salah arah, jika ada pun, tidak menyebabkan salah laksana keadilan (lihat perenggan 24–25).]

Notes

For cases on appellate court, power and duty of, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 189–256.

For cases on inferences from facts, see 7(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 707–712.

For cases on misdirection, see 5(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4861–4866.

For cases on s 39B(1)(a), (2) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 447–489.

Cases referred to

Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265, SC (refd)
Lim Sing Hiaw v PP [1965] 1 MLJ 85, FC (refd)
Lim Tong v The Public Prosecutor, Johore [1938] MLJ 41 (refd)

A *Osman bin Abdullah v PP* [1958] MLJ 12, CA (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193; [2006] 3 CLJ 193, FC (refd)
PP v Abdul Rahman bin Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Lin Lian Chen [1992] 2 MLJ 561; [1992] 1 CLJ 285, SC (refd)
B *Syed Ali bin Syed Abdul Hamid & Anor v PP* [1982] 1 MLJ 132, FC (refd)
Toh Ah Loh and Mak Thim v Rex [1949] MLJ 54 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
C Dangerous Drugs Act 1952 ss 2, 37(d), (da), (h), 39B(1)(a)
Evidence Act 1950 ss 8, 9

Appeal from: Criminal Trial No 45–06 of 2003 (High Court, Alor Star)

Bernard Francis (Bernard Francis) for the appellant.
D *Jamil Arifin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

Apandi Ali JCA:

E

[1] The appellant was convicted and sentenced to death on a charge of trafficking 23,829g of cannabis. The charge reads as follows:

> Bahawa kamu pada 8 November 2001 jam lebih kurang 12.20 tengahari di
F Kompleks Imigresen Bukit Kayu Hitam, dalam daerah Kubang Pasu, dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya jenis Cannabis seberat 23,829 gram. Oleh yang demikian, kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (Akta 234) dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

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[2] On appeal, we dismissed the appeal and confirmed the conviction and sentence. We now give our reasons.

FACTS OF THE CASE

H

[3] On 8 November 2001 at about 12.20pm, PW1, a custom officer, stopped an Isuzu pick-up bearing registration No XF 1369 PTN near the Immigration Complex, Bukit Kayu Hitam. The said pick-up came from the direction of Thailand and it was stopped for a routine random search. The sole
I occupant of the vehicle was the driver who was identified by PW1 as Mr Mamasobri Useng, the appellant in the present appeal.

[4] When the car was stopped by PW1, the appellant looked worried and was in the state of panic (kelam kabut). After identifying himself as a customs

officer, PW1 instructed the appellant to move his pick-up forward and reverse it to the green lane for inspection of the vehicle. The appellant was unable to reverse his pick-up properly until after three to four attempts. A

[5] Upon inspection of the pick-up which was carried out by PW1 together with two other customs officers, Siti Zainura and Mazli in the presence of the appellant, one transparent plastic package was found under the driver's seat. This plastic package containing dried leaves, suspected to be cannabis, was later marked and tendered as exh P10. B

[6] PW1 showed the plastic package to the appellant and placed it back at the same place, which was under the driver's seat. Later PW1 also found a key with remote control from the right pocket of the trousers of the appellant and when queried about it, the appellant replied that it was a key to another car. However, each time the remote was pressed there would be a sound of 'ketat!' coming from the back passenger's seat. The appellant was then detained and the pick-up was brought to the *stor pencegah* for a more detailed inspection. The further inspection was conducted in the presence of the appellant. C D

[7] During the further inspection of the pick-up, PW1 found a special compartment underneath the back passenger's seat. The compartment was covered by three layers of coverings. The first covering which was made of wood and covered with red rubber cloth, can be opened with the automatic remote. The other two coverings were made of iron sheets. When all the three coverings were opened, PW1 found 23 plastic packages containing dried leaves, suspected to be cannabis. These plastic packages were later tendered and marked as exhs P11–P33. E F

[8] All the recovered 24 plastic packages (exhs P10 and P11–P33) containing dried leaves were later sent to the chemist (PW2) for analysis and it was confirmed that the dried leaves were cannabis as defined under s 2 of the Dangerous Drugs Act 1952 ('DDA'). The total weight of cannabis was 23,829g. G

[9] PW3, a mechanical engineer of Public Works Department who examined the pick-up, at the request of Customs Department confirmed that the petrol tank under the passenger's seat of the pick-up had been modified. In his evidence PW3 said that the tank was divided into two compartments using an iron plate. The plate in the tank was attached to the tank using a brazing technique. The tank was made of mild steel. H I

[10] The learned trial judge in the course of the trial, also inspected the said pick-up and the compartment under the back passenger's seat and found it to be specially constructed which could be opened automatically by using the

remote, that was recovered from the appellant.

SUBMISSIONS BY PARTIES

[11] The main thrust of learned counsel's argument is on the usage of double presumptions by the learned trial judge. Learned counsel also submitted that the trial judge did not make any finding of actual possession and had imposed the wrong burden of proof upon the appellant, namely that of balance of reasonableness. Counsel quoted passages of the judge's grounds of judgment to support his argument.

[12] The prosecution, in reply, while conceding that there were passages in the grounds of judgment that indicated the usage of double presumptions, argued that the finding of facts were not disputed and that there were sufficient evidence to convict the appellant.

FINDINGS OF THIS COURT

[13] In order to appreciate the argument of learned counsel for the appellant, it is pertinent to cite the relevant passages in the grounds of judgment, that gave rise to the submission on double presumptions. The offending passages are at pp 99 and 100 of the appeal record, which respectively reads as follows:

> Saya sendiri telah memeriksa pick-up dan compartment berkenaan dan telah mencatitkan hasil pemeriksaan saya. Dalam keadaan sedemikian, anggapan di bawah sub-s (d) dan sub-s (h) s 37 Akta terpakai terhadap tertuduh.

and

> Saya berpuas hati bahawa selepas kes pendakwaan ditutup pihak pendakwaan telah membuktikan kes terhadap tertuduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dengan mengguna anggapan di bawah sub-ss (d), (da)(iv) dan (h) s 37 Akta. Tertuduh oleh yang demikian dipanggil membela diri ke atas pertuduhan yang dihadapi.

[14] On the issue of wrong burden of proof, the offending part of the grounds, can be seen at p 107 of the appeal records, which reads as follows:

> Berasaskan prinsip sepertimana tersebut di atas, selepas pembelaan tertuduh diperiksa dengan teliti saya dapati ianya tidak meyakinkan. Ini disebabkan bahawa kes bagi pihak pendakwaan telah dibuktikan dengan jelas. Keadaan-keadaan yang menunjukkan pengetahuan serta kawalan dan milikan tertuduh mengenai dadah berbahaya yang ada dalam pick-up tersebut oleh yang demikian perlu diberi penjelasan oleh tertuduh atas imbangan yang munasabah.

[15] After going through the whole evidence adduced at the trial, as can be found in the appeal record, despite the seeming imbroglio over the applications of the presumptions and purported wrong burden of proof, we find that there are overwhelming evidence to support the conviction.

[16] From the facts of the case, as illustrated above, it is crystal clear that the appellant was in possession of the drugs. From the evidence adduced, the possession of the drugs do have all the three damning characteristics, of incriminating the appellant, as enunciated in the classic case of *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54, namely (a) knowledge of nature of thing possessed; (b) power of disposal of thing possessed and (c) conscious of the possession of the thing.

[17] It is noted that the learned trial judge did in fact make an actual finding on the issue of possession. The learned judge at p 99 wrote: '… saya dapati pemilikan dadah berbahaya oleh tertuduh bukan merupakan pemilikan yang pasif tetapi satu pemilikan untuk mengedar sepertimana ditakrif di dalam s 2 dan s 39B(1)(a) Akta. Ini adalah kerana tertuduh sebenarnya membawa dengan pick-up berkenaan dadah berbahaya berkenaan dari Thailand masuk ke Malaysia. Amaun dadah berbahaya tersebut amatlah besar dan mustahil untuk kegunaan tertuduh sendiri. Akhir sekali dadah berkenaan disorok dengan susah payah di tempat dalam pick-up yang mana memang tidak akan disyaki oleh sesiapa yang melihat pick-up tersebut. Tertuduh mempunyai kawalan dan jagaan yang terus terhadap dadah berkenaan melalui *remote* yang dia simpan dalam poket kanannya'.

[18] On the alleged wrong burden, upon closer reading of the grounds of judgment, we conclude that basically there was no error committed by the learned trial judge. This can be seen at the conclusion of the judgment, where the learned judge wrote: 'Oleh yang demikian saya berpuashati bahawa pihak pendakwaan telah berjaya membuktikan kesnya terhadap tertuduh tanpa apa-apa keraguan yang munasabah.'

[19] In our view, learned counsel may have been misconceived on the issue of burden of proof after reading the preceding sentence before the conclusion by the learned judge, where it was written as follows: 'Tertuduh juga gagal atas imbangan keberangkalian membangkitkan apa-apa keraguan yang munasabah terhadap kes pihak pendakwaan.' On this matter, it is pertinent to state the law in such circumstances. It is trite law that any rebuttable statutory presumption can be rebutted on a balance of probabilities. The misconception is compounded by the references to the presumptions under s 37(d) and s 37(h) of the DDA. Section 37(d) of the DDA is *not applicable in this case*. It has been held by the Federal Court in the case of *Syed Ali bin Syed Abdul Hamid & Anor v Public Prosecutor* [1982] 1 MLJ 132 and more clearly in the case of *Public*

Prosecutor v Lin Lian Chen [1992] 2 MLJ 561; [1992] 1 CLJ 285 that the statutory presumption under s 37(d) of the Act did not arise as the vehicle in which the drugs was carried did not ipso facto fall within the meaning of the words 'anything whatsoever containing any dangerous drug'. Likewise the presumption under s 37(h), based on the facts and findings, is *also not applicable*. Section 37(h) is only a presumption as to knowledge of concealment, and from the evidence adduced there are other facts that showed such knowledge by the appellant.

[20] With that note, we now come to our finding of overwhelming evidence that we mentioned earlier. It is worth noting that the learned trial judge in his grounds of judgment (at p 95 of the appeal records), has listed the following findings:

> Daripada keterangan pihak pendakwaan terdapat beberapa perkara yang jelas telah dibuktikan:
>
> 1. Tertuduh merupakan pemandu pick-up berkenaan semasa ditahan oleh SP1 tanpa lain-lain penumpang dalamnya;
> 2. Apabila ditahan dan beritahu oleh SP1 bahawa SP1 adalah pegawai Jabatan Kastam, tertuduh menjadi gelisah dan kelam-kabut;
> 3. Apabila diminta menggerakkan ke hadapan dan mengundurkan pick-up ke tempat pemeriksaan pertama tertuduh tiba-tiba tidak dapat memandu pick-up berkenaan dengan baik dan perlu cuba tiga atau empat kali;
> 4. Di tempat pemeriksaan pertama SP1 telah dapati satu bungkusan mengandungi dadah berbahaya di bawah kerusi pemandu;
> 5. SP1 kemudian dapati satu kunci bersama remote daripada poket kanan seluar tertuduh dan apabila ditanya oleh SP1, 'ini kunci apa?', tertuduh menjawap 'kunci kereta lain';
> 6. Apabila SP1 tekan remote berkenaan SP1 mendengar bunyi 'ketat' di bahagian tempat duduk penumpang belakang pick-up berkenaan tiap-tiap kali remote ditekan;
> 7. Pemeriksaan khusus di tempat duduk berkenaan telah menunjukkan bahawa ada compartment khas dibina dalam tangki minyak petrol pick-up yang tersorok daripada pandangan dengan lapisan pertama kayu disalut dengan kain getah warna merah, lapisan-lapisan kedua dan ketiga yang terdapat kesan-kesan tangki tersebut dipotong;
> 8. Tempat 23 bungkusan dadah dijumpai jelas diperbuat dengan khas untuk menyorok dadah berkenaan; dan
> 9. Kesemua bahan-bahan tumbuhan dalam 24 bungkusan yang dijumpai disahkan sebagai genus cannabis.

[21] These findings do have a cumulative effect on the case against the appellant. Such findings carry with it a snow-ball effect that amplified and

constitute sufficient evidence to convict the appellant, without having to resort to any of the above mentioned presumptions.

[22] From the list of findings, it is particularly sufficient to infer guilty knowledge on the part of the appellant. The evidence of the accused looking stunned, scared and nervous, are evidence of conduct *after* the discovery of the remote control from the appellant's pocket that linked to the specially constructed compartment where the drugs were found to be concealed, are facts that are relevant within the meaning of s 8 of the Evidence Act 1950 and are therefore admissible. Consequential to that, the appellant is then mandated to explain such reactions, as required under s 9 of the Evidence Act. From the evidence given by the appellant in his defence, he did not offer any explanation at all for his reactions when the vehicle was stopped and searched, and this was done after the discovery of the remote linking to the specially constructed compartment, containing the drugs. In the light of that, the inference of knowledge was properly drawn against the appellant. In such circumstances, there is no real necessity for the prosecution to rely on the presumption of knowledge, under s 37(h) of the DDA. As stated earlier, inference as to the knowledge of the drugs is also independent of the statutory presumption under s 37(d) of the DDA. On this point, it is suffice to refer to the Federal Court decision in *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337.

[23] With the fact that the appellant was in control of the vehicle hours before being stopped, and was in possession of the remote linking to the specially constructed compartment of the petrol tank of the vehicle, it is clear that the appellant was in possession of the packages containing the drugs. Such findings, with the amount of cannabis being well in excess of 200g, will trigger the statutory presumption of trafficking under s 37(da) of the DDA.

IS THERE A MISDIRECTION BY THE TRIAL JUDGE?

[24] Despite the seeming imbroglio over the usage of the presumptions under s 37(d) and (h) of the DDA and the seeming misconception of the ensuing burden of proof, we are of the opinion that there is no error of misdirection by the learned trial judge. The final part of the judgment which touched on the basic burden of proof in criminal cases is sufficient to erase any suspicion or indication of any misdirection by the learned trial judge.

[25] In this case, even if we are wrong in holding that there is no misdirection, from the review and evaluation of all evidence presented at the trial, we further conclude that no failure of justice has been occasioned for the appeal to be dismissed. A fortiori, the proviso to s 60(1) of the Courts of Judicature Act 1964which reads as follows:

> 60(1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High Court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the trial court might have exercised:
>
> *Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.*

is sufficient law for us to act on. On the facts as disclosed, we are satisfied that notwithstanding the imbroglio of the usage of the statutory presumptions and having regard to the overwhelming nature of the case for the prosecution, the learned trial judge would have and indeed come to the same decision. In short, on the totality of the evidence the learned trial judge have made a correct decision in convicting the appellant. The decision was based on cogent and admissible evidence and not on ethereal matters. The misdirection, if any (of which we are of the opinion that there was none) had not occasioned any miscarriage of justice.

[26] In such circumstances, the application of the proviso to s 60(1) of the Courts of Judicature Act 1964 is proper and appropriate. The Federal Court case of *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193; [2006] 3 CLJ 193 and the Supreme Court case of *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265 are useful guidance on this matter. Such a position has also been pronounced in case law, since pre-merdeka days, such as in the cases of:

(a) *Lim Tong v The Public Prosecutor, Johore* [1938] MLJ 41;

(b) *Osman bin Abdullah v Public Prosecutor* [1958] MLJ 12; and

(c) *Lim Sing Hiaw v Public Prosecutor* [1965] 1 MLJ 85 at p 89.

CONCLUSION

[27] After hearing the submissions and upon perusal of the evidence as a whole, we find that the evidence adduced at the trial clearly indicate an inescapable inference that the appellant had 'mens rea possession' of the packages containing the drugs. The evidence also showed that the appellant was in possession of the packages with knowledge of their contents. There is not a single evidence to suggest otherwise. The drugs has been confirmed to be cannabis within the context of the DDA. The defence has been nothing, but bare denials. Such denials, in the face of the strong and over whelming evidence did not raise any reasonable doubt on the prosecution's case. The learned judge

had carefully considered the evidence of the prosecution and the defence. We are unable to find any error in his findings. There was no evidence in rebuttal to rebut the presumption of trafficking, under s 37(da) of the DDA.

[28] In such circumstances, and for reasons as stated above, we conclude that there is no merit in the appellant's appeal against conviction and sentence. By a unanimous decision, we dismissed the appeal. Accordingly, we affirmed the conviction and sentence, as decided by the High Court.

Appeal dismissed.

Reported by Andrew Christopher Simon